82-1545

No

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD C. KAISER, PETITIONER,

v.

CONSOLIDATED RAIL CORPORATION,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal common law should allow the doctrine of collateral estoppel to bar any subsequent proper refiling of an action, where said action was originally dismissed for a failure to join a necessary party?

2. How should the conflict between the 6th, 9th, 7th and 4th Circuits be resolved concerning the jurisdiction of the National Railway Adjustment Board?

3. Does due process prescribe that a person having a legal claim for injury be forced to submit said claim to an arbitor appointed by the claimant's adversaries?

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Miscellaneous:

OPINIONS BELOW

There is no opinion for the Sixth Circuit Court of Appeals in this cause. That Court summarily affirmed the order and opinion of the United States District Court for the Nothern District of Ohio, Western Division. (App., p.22)

JURISDICTION

Review is sought in this cause pursuant to authority found in 28 U.S.C. Section 1254(1) of the decisions of the United States Court of Appeals for the Sixth Circuit entered October 21, 1982, which was finalized by the denial of a timely request for rehearing dated December 16, 1982. (App., p.37)

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 8, 19, 21 and 41(b). See Appendix.

United States Code Title 45, Sections 151-153. See Appendix.

STATEMENT OF THE CASE

Richard C. Kaiser, petitioner herein, was hired by the New York Central Railroad in 1967 and worked as a fireman for six and one-half years for the New York Central and then the Penn Central Transportation Co. This "closed shop" required him to join a union. He joined the Brotherhood of Locomotive Engineers which negotiated collective bargining contracts with his employer and represented him pertaining to contract grievances.

On May 28, 1967, petitioner was seriously injured by the admitted negligence of his employer. While still receiving

substantial medical treatment for these injuries, petitioner was discharged from employment and denied further medical benefits.

He was discharged for failure to take and pass scheduled exams for promotion to engineer despite having successfully taken and passed six promotional exams during the prior two years. He was discharged under claim of suffering present serious medical disability (having recently undergone several hospital surgeries for medical complications directly related to his prior work injury), under claim that he should not have been denied requested medical execuses from examination as authorized by contract, under claim that the time periods specified by contract to be between promotion exams was not followed, and under claim that he was forced under duress while suffering serious medical disability to take an exam

and was fired that day.

Following discharge, petitioner personally contacted his Union Local Chairman concerning his discharge and the filing of a grievance.

His employer failing to reinstate his employment and his union failing to timely process his grievance, petitioner sought legal redress.

On December 5, 1975, petitioner filed suit in district court against his employer Penn Central Transportation Co. The complaint alledged, primarily, that his discharge of December 5, 1973, was a breach of contract.

Subsequently, petitioner amended the complaint by further alleging a breach of the duty of fair representation by his union without making it a party. This case was dismissed upon employer's motion for a lack of jurisdiction. The court reasoned that these contract disputes are within the

exclusive jurisdiction of the National Railway Adjustment Board (comprised of members from his employer and his union) under Section 3 of the Railway Labor Act, 45 U.S.C. 153. (App., p.39)

On May 29, 1977, petitioner filed his submission with the National Railway Adjustment Board, First Division, against his employer Pen Central. This was decided adversly on September 3, 1981. (App., p 35)

Almost two years before the NRAB made its decision, petitioner again sought legal redress because he was concerned about his opportunity to obtain a fair decision of his case and a determination that filing with the NRAB was not essential to judical review.

On December 5, 1979, petitioner commenced a second action in the same court against the successor to his employer, Consolidated Rail Corporation, for breach of

contract and, for the first time, against the Brotherhood of Locomotive Engineers for breach of duty of fair representation for failure to process his grievance. The complaint alledged primarily the same facts as did the first suit, but made the union a party defendant. The second case was dismissed upon motions of both defendants for different reasons. (App., p.26)

The complaint against the employer was dismissed for lack of jurisdiction under the doctrine of res judicta and collateral estoppel in that the first action was essentially the same as the second. Petitioner argued that the presence of the union as a party defendant combined with a claim of breach of duty of fair representation brings this cause within the Glover exception to the exclusive jurisdiction of the National Railway Adjustment Board.

Jurisdiction in the district court

is based upon the cases of Glover v. St. Louis-San Francisco R. Co., 396 U.S. 324 (1969) and Vaca v. Sipes, 386 U.S. 171 (1967).

The suit against the union was dismissed upon motion for summary judgment under Federal Rule 56(e) for not having met the burden of producing affidavits or other materail to establish a genuine issue of fact.

From the district court's application of the law appeal was taken to the court of appeals, which affirmed summarily and later denied a timely petition for rehearing. (App., p 37)

REASONS FOR GRANTING THE WRIT

Petitioner presents four reasons for the allowance of the writ.

1. The decision appealed from involves an important federal law question which should be settled by this Court alone.

The question is, should the modern concept of collateral estoppel include barring any claim where there was a non-joinder error?

In the instant case, a district court has set the following precedent: A prior dismissal for a failure to join a necessary party (not an indispensable party) can forever foreclose legal remedy in the district courts on the same cause.

This precedent was justified by applying the legal concept of collateral estoppel to a party's cause, where the first complaint had been dismissed for failure to join a necessary party.

Collateral estoppel is a judical doctrine modernized to achieve substantial justice. See Allen v. McCurry, 101 S. 411, 414, 415, and Blonder-Tongue Labs. v. University Foundation, 402 U.S. 331,322(1971).

In the instant case substantial justice

is not being served. Here, a technical non-joinder defect has been interpreted to finally determine the court's jurisdiction over a cause of action. Such an interpretation via collateral estoppes makes a curable defect fatal. Surley such an interpretation is not in the interest of substantial justice.

This Court has tacitly approved the commonly recognized principle that jurisdictional dismissals do not bar further litigation of a cause of action when a subsequent complaint cures the jurisdictional defect. See Etten v. Lovell Mfg. Co., 225 F.2d 844, 846, 3rd Cir. (1955), cert denied, 350 U.S. 966 (1956) and Smith v. Pittsburg gage and Supply Co., 464 F.2d 870, 3rd Cir. (1972).

Such a change in the law elevates collateral estoppel to the level of res judicata (e.g. a complete adjudication of the merits), affecting the common legal understanding of finality of litigation.

Attorneys across this land will no longer know what the difference is between collateral estoppel and res judicata for, in this case, issue preclusion has become a meritorious determination of a cause of action.

For these reasons alone this Court should decide what the modern limits of the doctrine of collateral estoppel should be.

2. The decision of the district court is so inconsistent with the decisions of this Court as to warrant plenary review.

This Court has directed the district courts to follow certain rules of law as authorized in the Federal Rules of Civil Procedure. See Federal Rule 1 and this Court's orders of adoption and admendment.

Federal Rules of Civil Procedure 8, 19, 21, and 41(b) deal with this Court's decisions and policies concerning problems

involving joinder of parties. Rule 8 establishes the general policy that pleadings are notice in nature. (App., p. 38) Rule 19(a)(b) makes it clear that complaints are to be dismissed only if parties are indispensable and cannot be brought in (there was no determination of indispensability by the first court in this case). Rule 21, does not make misjoinder a ground for dismissal of an action, and in fact encourages parties to be added or dropped. (App., p. 38) Rule 21 also allows any claim against a party to be severed and proceeded with separately. Rule 41(b) goes on to establish that a dismissal for failure to join a party is excepted from a determinationtion upon the merits. (App., p. 38)

The thrust of all these rules expresses this Court's decision not to make non-joinder itself a defect sufficient to evoke the sanctions of res judicata and collateral

estoppel.

Many courts, following the Federal Civil Rules, have found that a dismissal for lack of jurisdiction does not constitute adjudication of the merits. See Saylor v. Lendsley 391 F.2d 965, 2nd Cir. (1968), Eldridge v. Richfield Oil Corp., 364 F.2d 909, 9th Cir. (1966), cert. denied, 87 S. Ct. 750, Silvertown v. Valley Transit Cement Co., D.C. Cal, (1955), 140 F Suoo. 709, Williams v. Minnesota Min. & Mfg. Co., S.D. Cal., 14 F.R.D. 1 (1953), Korvettes Inc. v. Brous, 617 F.2d 1021, 3rd Cir. (1980, International Video Corp. v. Ampex Corp., 484 F.2d 634, 9th Cir. (1973).

In fact, the currently accepted statement of the law found in the Restatement of Judgments 2d, Sec. 20(1)(a) allows a proper refiling for failure to join a necessary party. (The Restatements of Judgments has been recognized by this Court in Blonder-

Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 331, 322 (1971), and in Montana v. United States, 440 U.S. 147, 154 (1979).

It is also clear that collateral estoppel applies only to the issue determined. See Montana v. United States, id at 153. In the instant case that issue was whether a party was necessary. Yet the second court barred the cause when this issue no longer existed, e.g. the party was present.

For these reasons the district court's decision is so inconsistent with this Court's decision on how res judicata and collateral estoppel are to be applied, that this Court should exercise its plenary power of review in order to assure that its decisions and opinions are followed.

3. In addition, here a federal court of appeals has rendered a decision which

sanctions a departure by a lower court from the holdings of this Court in specifically Glover v. St. Louis-San Francisco R. Co. 393 U.S. 324 (1969), and Vaca v. Sipes, 386 U.S. 171 (1967), so as to call for an exercise of this Court's power of supervision.

In Glover this Court held that federal courts have jurisdiction over actions which essentially involve a dispute between some employees, on the one hand, and union and management together, on the other, and not a dispute between employees and a carrier concerning the meaning of the terms of a collective bargaining agreement, over which the Railroad Adjustment Board would have exclusive jurisdiction under the Railway Labor Act. It also held that, in a case where resort to contractual or administrative remedies would be wholly fruitless, a petitioner's failure to exhaust such remedies constitutes no bar to judical review of his

claims.

Vaca held in part that federal district courts have jurisdiction over disputes between a railroad employee, his union, and his employer for a breach of the duty of fair representations by his union and a breach of contract by his employer.

In the instant case the petitioner, a railroad employee, did bring an action alleging a breach of contract by his employer and alleged that his union had breached its duty to fairly represent him.

The District Court's rationale in this case supports a departure from the holdings of Glover and Vaca in that before any railroad employee can seek jurisdiction in the federal district courts he or she must properly join his or her union in the first complaint or run the risk of losing his or her district court remedy. Such a high risk severely limits the thrust of Glover and Vaca,

forcing railroad employees who have serious disputes with their employer and union to submit their claims to NRAB arbitrators who are appointed by the claimant s adversaries.

Such a departure is inconsistent with the substantial justice remedy provided by Glover and Vaca, and call for an exercise of this Court's supervisory authority over the lower federal courts.

4. The decision appealed from conflicts with the decision of other Circuits as to the jurisdiction of the National Railway Adjustment Board.

In the instant case the District Court, sub judice, recognized the Glover-Vaca exception to the jurisdiction of the NRAB. It tacitly implied that the exception exists. in doing so, this case is in conflict with the 4th Circuit which has decided to follow the preclusion interpretation of Andrews v.

Louisville & Nashville R. Co., 406 U.S. 320 (1972). See Dorsey v. Chespeak and Ohio Railway Company, 476 F.2d 243, 4th Cir. (1973).

The 2nd and the 9th circuits are also in conflict with the 4th Circuit. They have held that Andrews is not a bar to district court jurisdiction over Glover-Vaca exception to the jurisdiction of the NRAB. See Schum v. South Buffalo Railway Co., 496 F.2d 328, 2nd Cir. (1974), and Otero v. Inter-National Union of Elec. R. and M. Wkrs., 474 F.2d 3, 9th Cir. (1973).

This conflict essentially invloves a disagreement among courts of appeals as to whether the Glover-Vaca exception exists in light of Andrews. This is an inportant and recurring question that warrants plenary review. The granting of certiorari in this case will resolve this conflict.

Respectfully submitted,

_____

Vesper C. Williams 11
Counsel for Petitioner

_____

Francis X Beytagh
Of Counsel

APPENDIX A

No. 81-3290

FILED
Oct. 21, 82

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CORCUIT

Richard C. Kaiser,
Plaintiff-Appellant, :

VS. : ORDER

Consolidated Rail Corporation :
f/k/a/ Penn Central Trans. Co.
Rrotherhood of Locomotive :
Engineers,
Defendant-Appellees :

BEFORE: ENGEL AND MERRITT, CIRCUIT JUDGES; District Judge*.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudical error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Signed

The Honorable Westley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

ISSUED AS MANDATE: Jan. 4, 1983
costs: None

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD C. KAISER, Plaintiff	)	No. C 75-480
-VS-	)	
PENN CENTRAL TRANS. CO., Defendant	)	OPINION AND ORDER

* * *

WALINSKI, J:

This cause is before the Court on the defendant's motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(1).

An examination of the pleadings and affidavits establish that prior to December 5, 1973, the plaintiff was employed by defendant Penn Central TRansportation company (hereafter Penn Central) as a fireman. On that date, he was discharged by the defendant. Plaintiff alleges that immediately after receiving the notice of discharge he contacted his union representative and informed him of the facts surronding the event. It was apparently his belief that the union was to process his grievance and appeal. During the two and one-half year period between his discharge and the filing of this suit, the plaintiff made several contacts with a representative of the union about his grievance and appeal. Despite those repeated communications, the union took no action on his grievance.

Purpoting to base jurisdiction of 28 U.S.C., 1332, the plaintiff filed this suit, seeking both damages and reinstatement,

alleging breach of the collective bargaining agreement between Penn Central and the Brothethood of Locomotive enggineers. Although the plaintiff alleges that the union breached its duty of fair representation, the union was not joined as a defendant.

Penn Central, in its motion to dismiss, asserts that despite the plaintiff's attempt to base jurisdiction on diversity of citizenship, the suit is governed by the Railway Labor Act, 45 U.S.C., 151 et seq. Pen Central argues that the dispute involves here is a "minor dispute", or grievance within the meaning of th Railway Labor Act. Its argument continues that since the dispute is minor, the Court is without jurisdiction to entertain the merits.

Plaintiff, on the other hand, asserts that this suit is not within the exclusive jurisdiction of the Railroad Adjustment Board because of the union's breach of its duty of fair representation.

For the reasons set forth below, the Court is satisfied that the dispute involved herein is a "minor" dispute within the exclusive jurisdiction of the Railroad Adjustment Board, and that the defnednat's motion to dismiss should be granted.

Under 3 of the Railway Labor Act, 45 U.S.C., 153. if the dispute involved is a "minor" dispute, or grievance, and the parties have been unable to reach a voluntary resolution then the National Railroad Adjustment Board has primary and exclusive jurisdiction to interpret the collective bargaining agreement and issue an appropriate award. Local 1477 United Transportation Union v. Baker, 482 F.2d 228 (6th Cir. 1973); see Elgin J. & E. Ry. v. Burley, 325 U.S. 711 (1945). A determination that the dispute

involved herein is minor would therefore leave this Court with jurisdiction.

It is now well settled that a dispute involving an employee's claim against his employer that he was discharged in violation of the collective bargaining agreement is a minor dispute or grievance. Andrews v. Nashville Railroad Co., 406 U.S. 320 (1972). As such, the plaintiff's claim is subject to the Railway Labor Act's requirement that it be submitted to the Railroad Adjustment Board for resolution. Section 3 First (i) of the Railway Labor Act, 45 U.S.C., 153 First (i).

Plaintiff neverless contends that there is an exception to this rule when there is an allegation that the union has breached its duty of fair representation to the employee. For this proposition he cites, inter alia, Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969).

In Glover, supra, the plaintiffs, a group of blacks and whites employees, brought suit for damages and injunctive relief agaonst both their employer railroad and their union. They alleged that the defendants were acting in concert to bar all of the plaintiffs from promotion solely to avoid having to promote any of the blacks. The district court granted the defendant's motion to dismiss holding that the dispute was within the wxclusive jurisdiction of the Railroad Adjustment Board. The Fifth Circuit Court if Appeals affirmed. 386 F.2d 452 (1967).

Reversing the Circuit Court, the Supreme Court held "that Sec. 3 First (i) by its own terms applies only to disputes between an employee or group of employees on a carrier or carriers." Glover, supra, quoting Conley v. Gibson, 355 U.S. 41, 44 (1957).

And the Court noted further;

> Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the "dispute" is one between some employees on the one hand and the union and management together on the other, not one "between an employee or group of employees and a carrier or carriers."

Glover, supra, 393 U.S. st 329.

Here, howerer, the suit involves simply a "minor" dispute "between an employee* * * and a carrier* * *." The union is not a party to the dispute, and the exception to the general rule found in Glover is not applicalbe. See Hill v. Southern Railway Co., 402 F. Supp. 414 (W.D. N.C. 1975) (union not made a party to suit). See also, Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974) (defendant union charged with breach of duty of fair representation).

As thedefendant points out in the affidavit of Richard Ellenberger, the plaintiff has an adequate and existing remedy before the National Railway Adjustment Board. Furthermore, that board is a neutral arbiter from whom the plaintiff can expect an unbiased decision. See Sec. 3 First, Railway Labor Act, 45 U.S.C., 153 First, for composition of board. Finally, at the hearing before the board, the plaintiff has the right to be represented by counsel and need not rely on his union to supply representation. 45 U.S.C., 153 First (j).

For the foregoing reasons, it is accordingly ORDERED that the defendant's motion to dismiss should be, and hereby is, granted, and that the complaint should be,

and hereby is, dismissed.

signed
United States District Judge

Toledo, Ohio
August 5, 1976.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard C. Kaiser,
Plaintiff
vs.

Consolidated Rail Corp.
f/k/a Penn Central
Trans. Co., et al.,
Defendants

Case No C 79-712

OPINION AND ORDER

YOUNG, J.:

This cause came to be heard upon the filing by defendant Consolidated Rail Corporation ("Conrail") of a motion to dismiss. Also, defendant Brotherhood of Locomotive Engineers ("Union") has filed a motion to dismiss or, in the alternative, for summary judgment. Plaintiff has now filed an opposition to thes motions, only at the urging of the Court in its July 14, 1980 order.

This is an action for breach of a collective barganing agreement between the Penn Central Transportation Co. ("Carrier")

and the Brotherhood of Locomotive Firemen & Engineermen ("BLF&E"). The amended complaint alleges that the defendant Carrier discharged plaintiff on December 5, 1973, in violation of the terms of the collective bargining agreement. The amended complaint charges the Union with a breach of duty of fair representation in connection with the Union's alleged failure to process plaintiff's grievance concerning the December 5, 1973 discharge.

Defendant Conrail's Motion to Dismiss

Defendant Conrail first moves to dismiss on the ground that Conrail is not the proper defendant and is not liable in its own right for a breach of contract occuring in 1973. Defendant contends that Conrail did not begin operations as a rail carrier until April 1, 1976, purauant to the Final System Plan prepared under 206 of the Regional Rail Reorganization Act, as amended, 45 U.S.C. 716. Defendant Conrail concludes that any liability in the present case remains a preconveyance obligation of the estate of the Penn Central Transportation Company under 45 U.S.C.774(e).

Subsequent to the defendant Conrail's motion to dismiss, plaintiff has filed an amended complaint purporting to divert plaintiff's claim on to Penn Central. It is unclear, however, whether the amended complaint successfully names Penn Central as a party defendant. Nevertheless, this Court finds that Penn Central is the proper party defendant and that 45 U.S.C. 774(e) designates Conrail as the processing agent for claims of employees arising under the collective bargaining agreement of defendant Penn Central.

Defendant Conrail next move for dismissal on the ground that plaintiff's present lawsuit is barred by the principles of res judicata and collateral estoppel. Defendant contends that plaintiff filed an identical claim arising out of the December 5, 1973 discharge before Judge Walinski entitled Richard C. Kaiser V. Penn Central Transportation Co., No. 75-480. The complaint in that prior case alleges the same cause of action as in the present case, i.e. that plaintiff's December 5, 1973 discharge violated the terms of the collective bargaining agreement. An amendment to that complaint also charged the Union with a breach of duty of fair representation, but failed to name the Union as a party defendant. Motion to dismiss Appendix A. In an opinion and order dated August 5, 1976, Judge Walinski dismissed plaintiff's action for lack of jurisdiction. Uudge Walinski held that plaintiff's complaint stated a "minor dispute," that is a contraversy over the meaning of an existing collective bargaining agreement. The Judge concluded that such "minor disputes" are within the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") under 3 of the Railway Labor Act, 45 U.S.C. 153.

Subsequent to Judge Walinski's opinion, plaintiff, through his attorney, filed a claim with the NRAB, First Division, on May 28, 1977. An oral hearing was held on January 25, 1978 at which both plaintiff and his attorney appeared befor the Board. Affidavit of A.W. Paulos. To date, no decision has been rendered by the Board.

Plaintiff has now filed this lawsuit involving the very same cause of action as

did the prior case. Both complaints allege that plaintiff's rights under the collective bargaining agreement were infringed by Penn Central's termination of plaintiff's employment on December 5, 1973. Both cases, in reality, involve the same parties, plaintiff Kaiser and defendant Penn Central.

Both lawsuits charg the Union with a breach of duty of fair representation. The only technical difference between the two lawsuits is that the present amended complaint actually names tha Union as a party defendant. Plaintiff contends that the presence of the Union as a party defendant, combined with a claim of breach of duty of fair representation, brings this claim within the Glover exception to exclusive jurisdiction of the NRAB. Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 326 (1969).

This Court finds that plaintiff's jurisdictional arguments regarding the Glover exception are barred by the doctrine of collateral estoppel. This precise jurisdictional issue was actually raised and decided by Judge Walinski in the prior action. The plaintiff raised the issue of the Union's alleged breach of duty of fair representation in the prior lawsuit, both in his amendment to the complaint and in his motion for reconsideration of Judge WAlinski's final opinion and order. Judge Walinski carefully considered the Glover exception and, yet, concluded that the complaint stated a "minor dispute" within the exclusive jurisdiction of the NRAB. Judge Walinski necessarily held that plainitff's conclusory allegations of breach of duty of fair representation were insufficient to give this Court jurisdiction of plaintiff's claim.

As stated above, the only discernible difference in the present case is that the Union is actuallu named as a party defendant. The present amended complaint contains the same conclusory allegations regarding the Union's breach of duty of fair representation. This Court will not permit plaintiff to circumvent Judge Walinski's order by simply naming the Union as a party defendant.

Since the issue of subject matter jurisdiction of this action was actually litigated and decided between plaintiff and defendant Penn Central in the prior action, plaintiff's argument on the same issue in the present case are barred by the doctrine of collateral estoppel. Dismissal of this case againse Penn Central will fully effectuate the purposes of the doctrine of collateral estoppel, that is, to protect adversaries from the expensive and vexation attending multiple litigation on the same issue; to conserve judical resources, and to foster reliance on judical action by minizing the possibility of inconsistent decisions. Montana v. United States, 440 U.S. 147, 153-54 (1979)

Finally, plaintiff's present lawsuit would, in effect, constitute an impermissible collateral atack on his case which is currently pending before the NRAB. Plaintiff has has opportunity to fully and fairly present his case to the Board with the aid of counsel. Once a claim is submitted to the Board, the Railway Labor Act permits judical review only after the board has rendered its decision. 45 U.S.C. 153 First. Accordingly, palintiff's remedy is to file for review of the decision of the NRAB if he is aggrieved thereby.

The Union's Motionfor Summary Judgment

The Union move to dismiss or, in the alternative, for summary judgment. The Union has submitted various affidavits and other materials in support of its motion. To the extent that the Unio relies on materials outside the pleadings, this Court will consider the Union's alternative motion for summary judgment. This motion has been opposed by plaintiff.

The Union moves for summary judgment on several grounds. First, the Union argues that this Court lacks jurisdiction of this lawsuit. The Union that this is a dispute over the application and interpretation of a collective bargaining agreement. By definition, the Union continues, this is a "minor dispute" within the exclusive jurisdiction of the NRAB. Andrewa v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). The Union contends that the presence of a claim of a breach of the Union's duty of fair representation should not change this result since the plaintiff was adequately tepresented by able counsel before the NRAB. 45 U.S.C. 153 First(i),(j). The Union concludes that the Andrews case requires the dismissal of both the Carrier and the Union.

As a second ground in support of its motion for summary judgment, the Union argues that the conclusory allegations in the complaint regarding the Union's breach of duty of fair representation are insufficient to state a claim for relief against the Union. The Union urges that plaintiff has failed to state a valid claim because plaintiff has alleged no facts supporting his charges against the Union, citing Gainey v. Brotherhood of Railway and Steamship Clerks, 313 F.

2d 318,323(3rd Cir 1963), and several other case.

Third, the Union claims there was no breach of a duty of fair representation for the reason that the Union was not the bargaining representative for plaintiff's particular unit of employees. The Union notes that plaintiff was a fireman at the time of his discharge. Affidavit of John f. Systma, @8. The Brotherhood of Locomotive Engineermen (the Union or "BLE") was not and is not the bargaining agent for the craft or class of firemen employees on the predecessor railraod (Penn Central) and does not represent those employed as fireman by Conrail. Affidavir of John F. Sytsma, @6-8. Therefore, the Union concludes that it owed no duty to plaintiff to prosecute a grievance on his behalf since plaintiff was not a menber of the bargaining unit of classification of employees from whom the Unio (BLE) had bargaining authority.

Fourth, even assuming arguendo that the Unio did owe a duty to plaintiff, the Union contends that there was no breach of duty of fair representation on the merits of the case fore the reason that plaintiff has no meritorious grievance under the terms and provisions of the collective bargaining agreement. The Union submits affidavits and other materials which show that the applicable collective bargaining agreement in effect between BLF&E and the railroad provided that if an individual failed three times to pass the qualifing examination to become a locomotive engineer he would be discharged from service. Affidavit of A.W. Paulos, Exhibit A, Submission 20, p.3. Plaintiff did not appear for his first and second attempts and failed in his third

attempt. Affidavit of A.W. Paulos, Exhibit A, Submissions 4,5,9,10. Thus, the Union contends it was justified in failing to process plaintiff's grievance since plaintiff discharge was clearly authorized by the terms of the collective bargaining agreement.

Finally, the Union contends that there was no arbitrary or bad faith conduct on the part of the Union in refusing to process plaintiff's grievance. The Union submits affidavits which state that the Union was never requested by plaintiff to take any action on his behalf until applicable time limits under the agreement had expired. Affidavits of John F. Sytsma. The Union concludes that the undisputed material facts before the Court show no breach of their duty of fair representation.

Plaintiff has failed to file affidavits or other materials in opposition to any of these issues raised by the derendant Union. Instesd, plaintiff has filed a two-page memorandum which contains only conclusory denials of the various points raised by the Union.

Rule 56(e), Fed. R. Civ. P. does not permit a party to rest on his pleadings in opposing a motion for summary judgment. Rule 56(e) provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

This Court finds that the plaintiff has not met the burden imposed by Rule 56(e) of producing affidavits or other materials to establish a genuine issue of fact regarding any of the defenses raised by the Union.

Under Rule 56(e), it is incumbent upon the plaintiff, no the Court, to demonstrate the existence of and genuine issue of fact. Accordingly, this Court finds that summary judgment in favor of the defendant Union is appropriate.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that the defendant Consolidated Rail Corporation's motion to dismiss be, and it hereby is, SUSTAINED and that the clerk shall dismiss the complaint as to defendant Consolidated Rail Corporation; and it is

FURTHER ORDERED that the motion of defendant Brotherhood of Locomotive Engineers for summary judgment be, and it hereby is, SUSTAINED and the clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Signed
Sr. United States District Judge

Toledo, Ohio
filed April 17, 1981

APPENDIX D

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

With Referee Robert E. Peterson

Award 23302
Docket 43043

PARTIES (Richard C. Kaiser
TO (
DISPUTE (Penn Central Trans. Co.

STATEMENT OF CLAIM: "Why Richard C. Kaiser is not reinstated with lost wages for being wrongfully terminated and denied complete process of appeal by Penn Central Transportation Co, after following proper Union-Management appeal proceedures?"

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

This is a claim on behalf of a fireman who was terminated after he failed to pass promotional examination to the position of Engineer.

Although it is contraverted as to whether the claim was in fact handled in the usual and timely manner on the property, we do not

find it necessary the Board consider such arguments. We say this for the reason that even if we were to so rule on such a matter, it would still be our finding that the claim must be denied on its merits.

The Claimant admittedly failed to pass the promotional examination after being afforded the opportunity to attend numerous instructional classes. Moreover, reasons advanced by claimant for his failure to take the promotional examination when scheduled, or to have availed himself of instructional classes, is suspect and self-serving. Accordingly, Claimant having failed to comply with the requirements mandated in the controlling agreement realative to promotional examinations, the claim is without merit and will be denied.

AWARD: Claim denied

National Railroad Adjustment
Board by ORDER OF FIRST DIVISION

DATED AT
CHICAGO, ILL
THIS 3rd DAY
of September 1981

Attest: Executive Secretary
NRAB

By: signed
Ass. Executive
Secretary

APPENDIX E

No. 81-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DEC 16 1982

RICHARD C. KAISER,

Plaintiff-Appellant

V.

ORDER

CONSOLIDATED RAIL CORPORATION f/k/a PENN CENTRAL TRANSPORATION CO.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendants-Appellee.

/

Before: ENGLE and MERRIT, Circuit Judges; and BROWN, Senior Circuit Judge.

No judge in regular active service of the Court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the original appeal. Upon consideration of said petition, the court finding no issue presented which have not previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

clerk

APPENDIX F

Federal Rules of Civil Procedure:

Rule 8(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 8(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 19(b) If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, of should be dismissed, the absent person being thus reguarded as indispensable.
The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudical to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessend or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Rule 21 Misjoinder and Non-joinder of Parties Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 41(b) " . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a proper party under Rule 19, operates as an adjudication upon the merits.

APPENDIX G

RAILWAY LABOR ACT, 45 U.S.C. 151, et seq., Section 3, First (q)

"If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such furhter action as it may direct. on such review, the findings

and order of the division shall be conclusive on the parties, except that the order of the division may be set aside in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to comform, of confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in Section 1291 and 1254 of Title 28."